FILED
AUG 5 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

NORMAN E. JORGENSEN
WILLIAM I. DENNING

Attorneys for
Public Service Television, Inc.

2011 Eye Street, N. W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	6
Reasons for granting the writ	10
Conclusion	15
Appendix A—Opinion and judgment below	1a

CITATIONS

CASES:

F.C.C. v. *WOKO*, 153 F. 2d 623 (C.A.D.C.)	13
F.C.C. v. *WOKO*, 329 U.S. 223	9, 13
Hall et al. v. *F.C.C.*, 247 F. 2d 626 (C.A.D.C.)	14
Massachusetts Bay v. *F.C.C.*, 261 F. 2d 55 (C.A.D.C.)	12
Petersburg Television Corporation, 21 Pike & Fischer Radio Regulations 311	11
Root Refining Co. v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), certiorari denied, 335 U.S. 912	9, 10
Sangamon Valley Television Corp., 19 Pike & Fischer Radio Regulations 1055	14
Sangamon Valley Television Corp. v. *F.C.C.*, 269 F. 2d 221 (C.A.D.C.)	12
WHDH, Inc., 20 Pike & Fischer Radio Regulations 395	11
WORZ v. *F.C.C.*, 268 F. 2d 889 (C.A.D.C.)	12

STATUTES:

Communications Act, as amended (47 Stat. 1064, 47 U.S.C., Section 151 *et seq.*):

Section 312	3, 4, 12
Section 409 (e) (2)	2, 6, 7, 8, 9, 10, 11, 14

MISCELLANEOUS: Page

Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Federal Communications Commission, Part 3, pp. 59-60 (1940) 14
Hearings before the Harris Committee, 86th Cong., 1st Sess., pp. 5325, 5327 (1958) 11
Hearings on Independent Regulations Agencies Legislation, 86th Cong., 2nd Sess., p. 86 (1960) .. 10
H.R. 14, 87th Cong., 1st Sess. (1961) 10
H. Rep. No. 2711, 85th Cong., 2nd Sess., pp. 28-29 (1958) 14
H. Rep. No. 2238, 86th Cong., 2nd Sess., pp. 22-25 (1961) 14
Landis Report on Regulatory Agencies to the President Elect, 86th Cong., 2nd Sess., pp. 13-15, 53 (Committee Print, 1960) 14
Note, "Ex Parte Contacts with the Federal Communications Commission", 73 Harv. L. R. 1178 (1960) 14
Vom Baur, 21 Journal of the Bar Association of the District of Columbia 99, 108 (1954) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Public Service Television, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, entered on July 6, 1961, setting aside the Federal Communications Commission's award, made on February 8, 1957, of Channel 10, Miami, to Public Service Television, Inc., and authorizing entry of an award favoring L. B. Wilson, Inc.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 1a-8a) is not as yet officially reported, but is unofficially reported in 21 Pike & Fisher Radio Regulations 2100. The decision of the Federal Communications Commission and the initial decision of the hearing examiner (S.J.A. 29 FCC 216-240)[1] are reported in 29 Federal Communications Commission Reports 216.

JURISDICTION

The judgment of the court below was entered on July 6, 1961, Appendix A, pp. 8a-9a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Section 409(c)(2) of the Federal Communications Act provides that "In any case of adjudication . . . which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before . . . the Commission . . . shall . . . directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate". The first question presented is whether the Commission may, notwithstanding an express refusal to find a violation of Section 409(c)(2)

---

[1] "S.J.A." designates the portion of the record printed as a supplemental joint appendix in the court below. By stipulation of the parties, this supplemental joint appendix is paginated in accordance with the appropriate pages of Volume 29 of the Federal Communications Commission Reports, containing the initial decision of Hearing Examiner Horace Stern, adopted December 1, 1958, and the Commission's decision, adopted July 14, 1960. "J.A." designates the portion of the record printed as a joint appendix in the court below.

by the Commission, set aside an award to an applicant upon grounds of *ex parte* presentation.

2. Even assuming that a non-legislative standard respecting *ex parte* approaches may be imported into cases arising under the Communications Act, the second question presented is whether the Commission and the Court below applied this standard arbitrarily and capriciously in holding petitioner's *ex parte* conduct disqualifying while holding that there was no irregularity in the *ex parte* conduct of Senator Smathers on behalf of L. B. Wilson, Inc.

3. Section 312 of the Communications Act provides that the Commission shall before revoking a construction permit provide proper notice to the permittee by means of an order to show cause, and hold an evidentiary hearing in which both the burden of proceeding with the introduction of the evidence and the burden of proof shall be on the Commission. The ~~second~~ third question presented is whether the Commission may set aside and revoke the grant of a construction permit without observing these statutory requirements.

4. The ~~third~~ fourth question presented is whether the Commission may set aside an award to an applicant on the sole grounds of *ex parte* presentation, without weighing other relevant qualifications and circumstances.

STATUTES INVOLVED

The relevant provisions of the Communications Act, as amended (48 Stat. 1064, 47 U.S.C., Section 151 *et seq.*), are as follows:

ADMINISTRATIVE SANCTIONS

Sec. 312—

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to Section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe, any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States; and

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of Section 1304, 1343, or 1464 of Title 18 of the United States Code.

(b) Where any person

(1) has failed to operate substantially as set forth in a license,

(2) has violated or failed to observe any of the provisions of this Act, or Section 1304, 1343 or 1464 of Title 18 of the United States Code, or

(3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor, and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In the case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of § 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect

to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

* * * * *

GENERAL PROVISIONS RELATING TO PROCEEDINGS—

WITNESSES AND DEPOSITIONS

SEC. 409 . . .

(e) . . .

(2) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate.

. . .

STATEMENT

Following a consolidated comparative proceeding involving the mutually exclusive applications of WKAT, Inc., L. B. Wilson, Inc., North Dade Video, Inc., and petitioner, Public Service Television, Inc., for a permit to construct a television station on Channel 10, Miami, Florida, the hearing examiner issued an initial decision on March 30, 1955, awarding the permit to WKAT, Inc. (S.J.A. 29 FCC 222) The Commission reversed the examiner and granted a construction permit to petitioner, which constructed a station and began broadcast operations.

The award to petitioner was appealed to the court below, jurisdiction having been invoked pursuant to the provisions of Section 402(b) of the Communications Act. While the appeal was pending, charges were aired in hearings before the House Subcommittee on Legislative Oversight which raised a question whether some of the applicants had improperly approached certain of the Commissioners who had decided the case. On April 17, 1958, the court below remanded the case for an evidentiary hearing to determine whether misconduct had occurred and if so whether it was attributable to any parties to the proceeding (J.A. 80-82).

A hearing was held before a specially-appointed hearing examiner, Judge Horace Stern. At the hearing, the Commission expressly refused to accept any burden of proof (J.A. 144, 147), and the hearing examiner excluded, as irrelevant, evidence bearing on the relative or comparative merits of the parties or the over-all character qualifications of petitioner, since in his view the remanded proceeding was an inquiry limited solely to four specified issues, all concerning the matter of *ex parte* approaches (J.A. 84, 142, 147-148, 178-184).

On December 1, 1958, the hearing examiner issued his initial decision, finding *inter alia* that Commissioners Mack and McConnaughey had received representations regarding the case which were not disclosed on the record.[2] With particular reference to peti-

[2] The hearing examiner also found that a memorandum in favor of North Dade Video, Inc., one of the applicants, was sent to Commissioner Craven (S.J.A. 29 FCC 239) and the Commission found that principals of North Dade Video, Inc., met and talked with Commissioners Sterling and Hyde *ex parte* (S.J.A. 29 FCC 217, 220).

tioner, the examiner found that Public Service had sought to engage Thurman Whiteside, a local Miami attorney, as counsel of record, that Whiteside refused such employment with a promise that he would "help", that he did endorse Public Service in private conversations with Commissioner Mack and that he later withdrew this endorsement. The examiner expressly found that although Public Service knew that Whiteside and Mack were friends, Public Service did not have knowledge of any financial relationship between them. (S.J.A. 29 FCC 231-232, 235, 238; J.A. 109). With particular reference to L. B. Wilson, Inc. there was undisputed evidence that Senator Smathers of Florida, executor of L. B. Wilson's estate, discussed the application of L. B. Wilson, Inc. with Commissioner Mack on two occasions, one of which was in the Commissioner's office (J.A. 89-90).

The examiner concluded that while petitioner did not retain Mr. Whiteside, it had tacitly ratified his conduct (S.J.A. 29 FCC 232, 238, 239). However, he expressly refused to find that petitioner had violated Section 409(c)(2) of the Act which forbids any person who has "participated in the presentation or preparation for such presentation of such case" from directly or indirectly making any additional presentation respecting such case, unless with notice and opportunity for all parties to participate (J.A. 110). The examiner made no finding respecting the *ex parte* approaches of Senator Smathers on behalf of L. B. Wilson, Inc. He concluded that the award to petitioner was only voidable and that none of the applicants was automatically disqualified from receiving a grant of its application. In his view the public interest required that the adverse effect of any misconduct be weighed along with all

the other relevant factors in a further comparative proceeding (S.J.A. 29 FCC 239-240, 237). The Commission, in a decision adopted July 14, 1960, modified the initial decision by disqualifying three of the applicants (WKAT, Inc., North Dade Video, Inc., and petitioner), without consideration of any other relevant factors. The Commission held that the "approach" of Senator Smathers on behalf of L. B. Wilson, Inc. was not improper (S.J.A. 29 FCC 220). It set aside the grant of construction permit to petitioner, and awarded a four-month default grant of a license to L. B. Wilson, Inc. (S.J.A. 29 FCC 216-220). The Commission did not disturb the examiner's refusal to find a violation of Section 409(e)(2).

The court below concluded that the order proposed to be adopted by the Commission was well within its authority, holding that the doctrine of *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514, 541 (C.A. 3), certiorari den., 335 U.S. 912, which involved bribery of a judge in a judicial proceeding, "applies to the adjudicatory functions of an administrative agency". It also held that "counterbalancing considerations of public interest in the service involved" would not justify an award to petitioner despite misbehavior, citing *F.C.C. v. WOKO*, 329 U.S. 223, 229. Accordingly, it ordered that the original grant of award to petitioner "will be set aside, and the case is remanded to the Commission for entry of its proposed order." (Appendix, *infra*, pp. 5a, 6a, 8a)

REASONS FOR GRANTING THE WRIT

The decision of the court below raises questions of substantial importance in the administration of the Communications Act and administrative agencies generally.

1. By its holding that the doctrine of the *Root Refining* case, *supra*, respecting *ex parte* influence in the context of a judicial proceeding, "applies to the adjudicatory functions of an administrative agency", the court below disregards the specific and carefully limited legislative language contained in Section 409(c)(2) of the Communications Act, dealing with the subject matter involved.[3] Section 409(c)(2) by its terms prohibits *ex parte* representations only when made by persons who have "participated in the presentation or preparation for presentation of such case" before the Commission. Congress has deliberately rejected efforts to enlarge the scope of this provision, despite the fact that numerous proposals to amend the Section have been made and a bill to broaden the provision is pending during the present session.[4] See-

---

[3] The *Root* case it should be noted, involved bribery of a judge. The instant case involves at most an *ex parte* presentation on the merits.

[4] Ex-Commission Chairman Ford, testifying at Congressional hearings, emphasized the limited nature of the prohibition contained in Section 409(c)(2) and the need for legislation to broaden the prohibition:

> In other words, it does not say 'no person,' but it just says no person who has participated, which, of course, exempts everybody else under the sun. So here, as a matter of law, this statute permits ex parte contracts, or does not prohibit them, and by implication it exempts them.

Hearings on Independent Regulatory Agencies Legislation, 86th Cong., 2nd Sess., p. 86 (1960). See also, H.R. 14, 87th Cong., 1st Sess. (1961).

tion 409(c)(2), which the Commission expressly refused to find that petitioner had violated, embraces the sole legislative standard governing the propriety of ex parte contacts. The court's blanket proscription of all ex parte contacts before the Commission imports concepts in conflict with the explicit provisions of the Communications Act, and other regulatory statutes. All applicants before the Commission and other administrative agencies operating pursuant to similar legislative provisions respecting ex parte presentations are placed in doubt and confusion by the court's ruling, and run the serious risk of penalties imposed based upon standards unknown to the letter or spirit of the applicable congressional enactments.

2. The Commission disqualified petitioner because it found that Whiteside, as an "emissary" of petitioner, made *ex parte* representations to Commissioner Mack. The Commission awarded Channel 10 to L. B. Wilson, Inc., because it found that Senator Smathers, as Wilson's executor, committed no impropriety in discussing Commissioner Mack's vote on the Wilson application with Commissioner Mack in the Commissioner's office. This failure of the Commission to dispense even-handed justice respecting *ex parte* approaches in this and other substantially similar cases is arbitrary and capricious.[5] Such a flagrant departure

---

[5] *Cf. WHDH, Inc.*, 20 Pike & Fischer Radio Regulations 395 (*ex parte* luncheon with Commissioner results in comparative demerit, not absolute disqualification) with *Petersburg Television Corp.*, 21 Pike & Fischer Radio Regulations 311 (*ex parte* dinner with Commissioner results in confirmation of award). See also the proceeding in Channel 4 Pittsburgh where the Commission did not reopen the award despite the statement of the then Chairman McConnaughey that an interested party in discussing the merits of the case at an *ex parte* luncheon stated that "he might possibly be in a position to throw my son some business." Hearings before the Harris Committee, 86th Cong., 1st Sess., pp. 5325, 5327 (1958).

from elementary due process warrants review by the Supreme Court.

3. The Commission with the approval of the court below has set aside the construction permit for Channel 10, Miami, Fla., previously awarded to Public Service Television. This order if sustained, will put petitioner off the air and terminate its broadcast operations in Miami. The decision of the court below, affirming this revocation of petitioner's construction permit violates fundamental due process of law. Section 312 of the Act requires that the Commission must, before revoking a permit, (a) issue an order to show cause why the permit should not be revoked, which order must contain specific allegations and notice of intention to revoke; and (b) hold an evidentiary hearing in which both the burden of proceeding with the introduction of the evidence and the burden of proof shall be on the Commission. The Commission complied with none of these statutory requirements. It did not issue an order to show cause and it did not hold an evidentiary hearing at which it assumed the burden of proof. It specifically refused to assume the burden of proof, p. 8, *supra*. The Commission has erroneously based its revocation order, and the court below has erroneously affirmed that revocation, on a limited factual inquiry before Judge Stern (J.A. 142, 147, 357)—an inquiry which did not contain the statutory procedural or substantive safeguards. Substantially similar procedure has been followed by the Commission in other cases resulting from the Harris Committee disclosures. See, e.g., *Massachusetts Bay* v. *F.C.C.*, 261 F. 2d 55 (C.A.D.C.); *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F. 2d 217 (C.A.D.C.); *WORZ* v. *F.C.C.*, 268 F. 2d 889 (C.A.D.C.). The Commission's

action, approved by the court below, deprives petitioner of the statutory proceeding to which it is entitled under the Act as the holder of a construction permit under which it has built and operated a television broadcast station. Moreover, because the Commission's action, contrary to the express provisions of the Act, affects a number of other similar pending cases affecting major television broadcast stations, and represents the test case of the so-called ex parte cases, a question of substantial importance is clearly posed.

4. Judge Stern, the special hearing examiner, concluded that the facts as found in the supplemental hearing could not, standing alone, support absolute and automatic disqualification. In his view, effectuation of the statutory public interest standard required the Commission to give full consideration to "all relevant factors, financial, technical, experience, planning, and the numerous other requisite qualifications that enter into the question." (S.J.A. 29 FCC 237). The Commission relying on this Court's decision in the *WOKO* case, *supra*, refused to consider these other relevant considerations and proceeded to resolve the ultimate question of licensee qualifications on the limited evidence adduced at the remanded hearing.

The failure and refusal of the court below in its decision to deem relevant the counterbalancing qualifications of petitioner, the circumstances of the case, and the public interest in the service involved, are an unwarranted interpretation and application of this Court's decision in the *WOKO* case, requiring clarification by this Court. Considerations of the public interest, "the guiding star of the Commission" *F.C.C.* v. *WOKO*, 153 F. 2d 623, 631 (C.A.D.C.), warrant full weighing by the Commission, and review

by the court below, of all relevant factors, financial, technical, experience, planning, and the numerous other requisite qualifications that enter into the question, together with the evidence of misconduct. (S.J.A. 29 FCC 237). Moreover, petitioner has "a record of past reliability and candor to be considered by the Commission together with other circumstances." *Hall et al.* v. *F.C.C.*, 247 F. 2d 626 (C.A.D.C.) And, as the Commission has itself acknowledged in another so-called ex parte case, "the prevailing view at that time", respecting *ex parte* approaches, and the understanding of parties, practitioners, legislators and the Commission itself, is pertinent to the question of ultimate disposition of the matter, and is properly to be canvassed in the hearing.[6] The disregard of these relevant considerations by the Commission and the court below raises a substantial question concerning the scope and meaning of the statutory public interest standard.

5. Petitioner has constructed and established a television plant and associated facilities at a cost of

---

[6] *Sangamon Valley Television Corp.*, 19 Pike & Fischer Radio Regulations 1055, 1056 e. Substantial evidence of "the prevailing view at that time" condoning, accepting, and encouraging ex parte approaches may be found in: Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Federal Communications Commission, Part 3, pp. 59-60 (1940); Vom Baur, 21 Journal of the Bar Association of the District of Columbia 99, 108 (1954); Note, "Ex Parte Contacts with the Federal Communications Commission", 73 Harv. L. Rev. 1178 (1960); H. Rep. No. 2711, 85th Cong., 2nd Sess., pp. 28-29 (1958); H. Rep. 2238, 86th Cong., 2nd Sess., pp. 22-25 (1961); Landis Report on Regulatory Agencies to the President Elect, 86th Cong., 2nd Sess., pp. 13-15, 53 (Committee Print, 1960). Such "prevailing view" is reflected in the limited scope of Section 409(c)(2).

$2,000,000. It has been broadcasting a full television program schedule since 1957. With its staff of 74 employees, it has gone to considerable effort to build good will in the community. The Commission's invalid revocation of petitioner's permit will reduce its plant value to a nominal figure, will render worthless valuable network and commercial relationships, will compel loss of staff and will in sum destroy petitioner as a going broadcasting concern.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NORMAN E. JORGENSEN
WILLIAM I. DENNING

Attorneys for
Public Service Television, Inc.

2011 Eye Street, N. W.
Washington 6, D. C.

August 4, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13718, 14021, 14170

WKAT, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

PUBLIC SERVICE TELEVISION, INC.,
L. B. WILSON, INC., *Intervenors*

No. 13725

EASTERN AIR LINES, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

PUBLIC SERVICE TELEVISION, INC.,
L. B. WILSON, INC., *Intervenors*

No. 16089

NORTH DADE VIDEO, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

L. B. WILSON, INC., *Intervenor*

No. 16091

ELZEY ROBERTS, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

L. B. WILSON, INC., *Intervenor*

Appeals from the Federal Communications Commission

Decided July 6, 1961

Messrs. A. Harry Becker and *Alexander Boskoff* for appellant in No. 16089.

Mr. J. Roger Wollenberg, with whom *Mr. Andrew G. Haley* was on the brief, for Elzey Roberts, appellant in No. 16091 and *amicus curiae* in Nos. 13718, 14021 and 14170.

Mr. Max D. Paglin, General Counsel, Federal Communications Commission, with whom *Mr. John L. FitzGerald*, General Counsel, Federal Communications Commission, at the time the brief was filed, and *Messrs. Joel Rosenbloom* and *James T. Brennan*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Mr. Daniel R. Ohlbaum*, Assistant General Counsel, Federal Communications Commission, also entered an appearance for appellee in Nos. 13718 and 13725.

Mr. Norman E. Jorgensen, with whom *Messrs. William I. Denning* and *A. G. Hardy* were on the brief, for intervenor Public Service Television, Inc., in Nos. 13718, 13725, 14021 and 14170.

Mr. Robert A. Marmet, with whom *Messrs. Paul M. Segal* and *Edwin R. Schneider, Jr.*, were on the brief, for intervenor L. B. Wilson, Inc.

Mr. Lewis Bernstein, Attorney, Department of Justice, of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for the United States of America, as *amicus curiae*. *Messrs. W. Wallace Kirkpatrick, Richard A. Solomon*, and *Henry Geller*, Attorneys, Department of Justice, were on the brief for the United States of America, as *amicus curiae*.

Messrs. Paul A. Porter, G. Duane Vieth and *James O. Juntilla* were on the brief for appellant in Nos. 13718, 14021 and 14170. *Mr. George Bunn* also entered an appearance for appellant in No. 13718. *Mr. L. Reed Miller* also entered an appearance for appellant in No. 14021.

Messrs. E. Smythe Gambrell and *Harold L. Russell* were on the brief for appellant in No. 13725.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: These are appeals from orders of the Federal Communications Commission. The controversy arose when mutually exclusive applications for a permit to construct a television station at Miami, Florida, were filed. An award was made to one of the applicants. It was appealed. While the appeals were pending substantially authoritative information came to the court indicating irregularity in the award. The court remanded the case for an evidentiary hearing on issues thus posed.[1] The Commission appointed a special master, who conducted extensive hearings and made findings, conclusions, and an initial decision. Exceptions

---

[1] WKAT v. Federal Communications Comm'n, 103 U.S. App. D.C. 324, 258 F. 2d 418 (D.C. Cir. 1958).

being filed, the Commission held a hearing and entered a decision and order. It said, in part:

> "4. The Commission, after careful evaluation of the facts, is of the opinion that the misconduct of WKAT, Inc., North Dade Video, Inc., and Public Service Television, Inc., reflects so adversely upon their character as to demonstrate that they lack the qualifications to operate the station sought in this application. None of them was satisfied to be judged upon the record made in open hearing through the processes of adjudication specified by statute and grounded upon the principles of judicial fairplay; each of them sought to influence the results by factors unrelated to the merits of the case and not a part of the hearing record. Willingness thus to pervert the processes of administrative adjudication is convincing proof that the requisite character qualifications are lacking. Their misconduct is ' * * * of such moment as * * ' logically and rationally to give rise to the conclusion that the public interest, convenience, and necessity would not be served were * * * ' [citing cases] the applications in question, or any of them, granted."

The Commission issued an order disqualifying the three applicants named in the foregoing quotation.

The Supreme Court approached this subject in the *Hazel-Atlas* case.[2] A patent was there involved. It had been obtained by fraud on the Patent Office and sustained by carrying the fraud through to the Court of Appeals. The fraud was the preparation and publication of a spurious article purporting to be an authentic opinion of an expert used as evidence. Mr. Justice Black, writing for the Court, had this to say:

> "This matter does not concern only private parties. There are issues of great moment to the public in a

[2] Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944).

> patent suit. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U.S. 661; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."[3]

The Court set aside the judgment which had been entered twelve years earlier, recalled its twelve-year-old mandate, dismissed the appeal, and issued a mandate to the trial court directing it to set aside its judgment upholding the patent and to reinstate its judgment against the patent. All of these were infringement suits. The Court wrote: "To grant full protection to the public against a patent obtained by fraud, that patent must be vacated."[4]

In *Root Refining Co.* v. *Universal Oil Products Co.*,[5] Circuit Judge Morris A. Soper wrote:

> "The client who with evil intent employs such an agent [*i. e.*, one who attempts by personal influence to control a judge or jury or who holds himself out as able to do so] fares no better in the instant case. To him also the doors of the courts are closed. From

---

[3] *Id.* at 246.

[4] *Id.* at 251.

[5] 169 F. 2d 514, 541 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949).

> the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the rights he seeks to obtain."

This doctrine applies to the adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

We do not have here an ordinary case of "unclean hands", in which counterbalancing considerations of public interest in the service involved might justify awards despite misbehavior.[6] This case concerns corrupt tampering with the adjudicatory process itself. No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government, the Commission concluded. The order proposed to be adopted by the Commission is well within its authority, the breadth of which is well illustrated by the order approved in *Massachusetts Bay Telecasters, et al.* v. *Federal Communications Comm'n.*[7]

One of the original applicants, L. B. Wilson, Inc., was not involved in irregular activities. It was found qualified by the Commission, and the Commission directed that its application be granted, subject to the proviso that any

---

[6] See, for example, the discussion in Federal Communications Comm'n v. WOKO, 329 U.S. 223, 229 (1946).

[7] Nos. 13896 and 13899, D.C. Cir. (Order, Jan. 19, 1961).

license issued upon completion of the construction be for four months and no longer. This latter action by the Commission was for the purpose of resolving a difficult practical problem. The operator who was on the air was one of the applicants found unqualified; but a license to L. B. Wilson for a full term, without comparative consideration with any new applicants, would give Wilson a measure of advantage which, in view of all the surrounding circumstances, was deemed by the Commission to be unwise. We think the decision reached by the Commission was well within its authority and was a reasonable one. It was seeking to sustain the public interest in respect to continuing television service to the viewing public in the Miami area. Closing the station entirely was an alternative not required in the circumstances. Accordingly the course followed may be approved.

A procedural problem is presented which arises from the terms of our remand. The question is whether we meant the Commission to enter orders, subject to review on appeal, or whether we meant the Commission to formulate the orders it deemed appropriate and then to report its recommendations to us. The latter is our view. In our remand order we specifically retained jurisdiction of the appeals. This was in accord with the intendment of the Act of December 29, 1950,[8] as amended August 28, 1958.[9] The second sentence of Section 7(c) of that Act[10] provides that an agency "shall file in the court" its findings and order upon a remand for the adducement of additional evidence. This obviously means, we think, that the case remains in the court during the remand and that the court should consider the new findings and order upon the filing thereof by the agency. We think this

[8] 64 STAT. 1129, 1130.

[9] 72 STAT. 951.

[10] 5 U.S.C. § 1037(c) (1958).

statute does not contemplate that the agency can moot an appeal during a remand and thus foreclose court consideration of its conclusions upon the additional evidence. Our views on various aspects of this phase of our problem have been stated in *McClatchy Broadcasting Co.* v. *Federal Communications Comm'n.*[11]

The original grant of award, which is the order brought here by the original appeals, will be set aside, and the case is remanded to the Commission for entry of the order it now proposes consequent to its findings after the adducement of the additional evidence upon the remand. If we were to treat the order of the Commission now before us (dated July 14, 1960) as a final order before us upon the appeal of North Dade Video, we would affirm it.

It is our understanding that the Commission contemplates consideration of other applications for the station, if any are offered, when the matter of a full-term license comes before it, and it will then follow whatever proceedings are appropriate under the circumstances at that time. Its decision then will of course be subject to review here upon appeal.

So ordered.

Judgment

These appeals came on to be heard on the records from the Federal Communications Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that these cases are remanded to the Federal Communications Commission with directions to set aside the order of the Federal Communications Commission

---

[11] 99 U.S. App. D.C. 199, 203-204, 239 F. 2d 19, 23-24 (1956), *cert. denied*, 353 U.S. 918 (1957).

entered February 8, 1957, granting the application of Public Service Television, Inc., for a construction permit for a new television station to operate on Channel 10, Miami, Florida, and for further proceedings consistent with the opinion of this court this day filed in these cases.

PER CIRCUIT JUDGE PRETTYMAN

Dated: July 6, 1961

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 1 1961
JAMES R. BROWNING, Clerk

No. 289

In the Supreme Court of the United States

OCTOBER TERM, 1961

PUBLIC SERVICE TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LEE LOEVINGER,
Assistant Attorney General,

RICHARD A. SOLOMON,
Attorney,

Department of Justice,
Washington 25, D. C.

MAX PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Assistant General Counsel,

RUTH V. REEL,
Counsel,

Federal Communications Commission
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	11
Conclusion	17

CITATIONS

Cases:

Federal Communications Commission v. *Broadcasting Service Organization*, 337 U.S. 901, reversing *per curiam*, 171 F. 2d 1007	16
Federal Communications Commission v. *WOKO, Inc.*, 329 U.S. 223	11, 14, 16
Ford Motor Co. v. *National Labor Relations Board*, 305 U.S. 364	16
Hazel-Atlas Co. v. *Hartford Co.*, 322 U.S. 238	10, 11, 14
Mansfield Journal Co. v. *Federal Communications Commission*, 180 F. 2d 28	14
Mester v. *United States*, 70 F. Supp. 118, affirmed 332 U.S. 749	14, 16
Morgan v. *United States*, 298 U.S. 468	14
Morgan v. *United States*, 304 U.S. 1	14
National Broadcasting Co. v. *United States*, 319 U.S. 190	14
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U.S. 498	15
Ohio Bell Telephone Co. v. *Public Utilities Commission*, 301 U.S. 292	14
Root Refining Co. v. *Universal Oil Products Co.*, 169 F. 2d 514, certiorari denied, 335 U.S. 912	10, 11
Sangamon Valley Television Corp., 19 Pike & Fischer, Radio Regulation 1055	15
Sangamon Valley Television Corp. v. *United States*, 269 F. 2d 221	15

Cases—Continued Page

WHDH, Inc., 29 F.C.C. 204, rehearing denied, 29 F.C.C. 986, affirmed *sub. nom. Massachusetts Bay Telecasters, Inc.* v. *Federal Communications Commission* case No. 13,896, order of January 19, 1961, certiorari denied *sub nom. WHDH, Inc.* v. *Federal Communications Commission*, 366 U.S. 918 14
WKAT, Inc., 22 F.C.C. 117 4
WORZ, Inc. v. *Federal Communications Commission*, 358 U.S. 55 11

Statutes:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*:
Section 312, 47 U.S.C. 312 15
Section 402(b), 47 U.S.C. 402(b) 4
Section 409(c)(2), 47 U.S.C. 409(c)(2) 3, 11, 12, 13, 14
Judicial Review Act of 1950, 5 U.S.C. 1031, *et seq.* 9

Miscellaneous:

Hearings on Independent Regulatory Agencies Legislation, before the House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., pp. 73-86 14-15

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the court below remanding the cases to the Federal Communications Commission for further hearing is reported at 258 F. 2d 418. The court's opinion (Pet. App. 1a-8a), approving the Commission's proposed decision and order after the remand, has not yet been officially reported. The original decision of the Commission is reported at 22 F.C.C. 117, and its opinion and order denying rehearing at

23 F.C.C. 390. The Commission's decision and order upon the remand are reported at 29 F.C.C. 216 and 221, and its opinion and order denying rehearing at 29 F.C.C. 983.

JURISDICTION

The order of the court of appeals remanding the cases to the Commission was entered on April 17, 1958. The judgment of the court (Pet. App. 8a-9a) approving the Commission's proposed decision and order on remand was entered on July 6, 1961. The petition for a writ of certiorari was filed on August 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and section 402(j) of the Communications Act, 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission, in a comparative licensing proceeding among several mutually exclusive applicants for television facilities in Miami, Florida, found that the petitioner, one of the applicants, had procured the services of a long-time friend of one of the Commissioners to speak to him, *ex parte*, in an attempt to influence him to vote in petitioner's behalf. The Commission concluded that such activities demonstrated that the petitioner lacked the essential qualifications to be a broadcast licensee and disqualified it from further consideration for the license. The questions presented are:

1. Whether the Commission could properly apply to its adjudicatory licensing proceedings the principle

that a privilege should be denied to one who seeks its award by improper off-the-record influence, in the absence of a finding that the party violated the prohibitions of section 409(c)(2) of the Communications Act against *ex parte* presentation of additional material by persons who have participated in the preparation or presentation of the case for hearing.

2. Whether the Commission's action constituted a revocation of petitioner's construction permit without compliance with the procedural requirements of section 312 of the Communications Act.

3. Whether the Commission could disqualify petitioner on these grounds, without considering its other qualifications to be a licensee of a television station.

4. Whether the Commission's factual determination that petitioner had engaged in disqualifying conduct was arbitrary or discriminatory, in the light of its treatment of a similar charge with respect to another applicant for the facilities.

STATUTE INVOLVED

Pertinent sections of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set out in the petition (pp. 4-6).

STATEMENT

On February 7, 1957, after a comparative hearing among four applicants for a new television station on Channel 10 in Miami, Florida, the Commission granted the application of petitioner Public Service Television, Inc. (Public Service), and denied the com-

peting applications of WKAT, Inc. (WKAT), North Dade Video, Inc. (North Dade), and L. B. Wilson, Inc. (Wilson). *WKAT, Inc.*, 22 F.C.C. 117 (excerpted at J. App. 37). Rehearing was denied on September 11, 1957 (23 F.C.C. 390). Appeals to the court below, in which petitioner Public Service was an intervenor, were taken by WKAT and Eastern Airlines, Inc.,[1] under section 402(b) of the Communications Act, 47 U.S.C. 402 (b).

On March 13, 1958, pending argument on the merits of the appeals, the Commission filed a motion for a remand to permit it to reconsider the grant in the light of charges which had been made, after the filing of the appeals, by witnesses before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce. These charges were that one of the Commissioners who participated in the administrative proceeding should have disqualified himself and that one or more of the applicants had engaged in improper conduct in attempting to secure an award from the Commission. In support of this motion, the Commission lodged with the court a transcript of the Congressional investigatory proceedings.

By order entered April 17, 1958, after argument by the parties, the court of appeals remanded the cases

---

[1] Eastern Airlines, Inc., a competitor of Public Service's parent corporation, National Airlines, Inc., had opposed the grant to petitioner before the Commission. WKAT, Inc., also appealed from a subsequent ruling of the Commission modifying the petitioner's construction permit. All of the appeals were consolidated below.

to the Commission with instructions to hold an evidentiary hearing upon the charges of improprieties, and to consider the possibility that the award to petitioner Public Service might be void *ab initio* or voidable, and that one or more of the applicants might be disqualified to receive an award of a television permit by reason of misconduct (J. App. 80). The court ordered the Commission to make findings of fact on at least the following issues (J. App. 81):

> what circumstances formed the basis for the public charges that one of the members of the Commission should have disqualified himself in these proceedings; and
>
> whether any person or persons influenced or attempted to influence any member of the Commission in respect to the present proceedings in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 3 Cir., 1948, 169 F. 2d 514, 534-5, 540-1), and, if so, the full facts and circumstances; and
>
> whether any party to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct found by the Commission to have occurred.

The court further ordered the Commission to report its findings and recommend appropriate disposition of the appeals, over which it retained jurisdiction.[2]

---

[2] The court's order also provided that all original parties to the administrative proceeding be allowed to participate in the hearing and that the Department of Justice be permitted to participate as *amicus curiae*.

Pursuant to the court's order, the Commission reopened the record for further hearings before a specially appointed hearing examiner, Judge Horace E. Stern, retired Chief Justice of the Supreme Court of Pennsylvania (J. App. 83). The examiner issued an initial decision on December 1, 1958 (see Supp. J. App.,[3] 29 F.C.C. 221). He found that Public Service and WKAT, through their own officials or through emissaries whose conduct they secured and ratified, had "attempted improperly, by private interviews and otherwise and not by the recognized and public processes of adjudication, to influence Commissioner Mack with respect to the proceedings * * * in order to induce him to favor and vote for" them. (29 F.C.C. at 238.) He also found (29 F.C.C. at 239) that North Dade employed Robert F. Jones for the purpose of enlisting "the aid of Senators and Congressmen in obtaining for it the award of the construction permit for channel 10, Miami—a method which would have been improper for that purpose", but that there was no evidence that Jones had actually done anything improper.

In the case of petitioner Public Service, the examiner found that it had procured Thurman Whiteside, who was known to be a close friend of Commissioner Mack, to approach Mack off the record to urge him to vote for Public Service (29 F.C.C. at 225-227, 238, 239). The examiner further found that Mack, who

---

[3] The decisions of the examiner and the Commission upon the remand are contained in a Supplemental Joint Appendix, consisting of the Commission's official slip opinions.

ultimately voted for Public Service, had been rendered wholly unable to participate, and to vote with freedom and impartiality, in part because Whiteside was "one, who from time to time through many years, had made and was continuing to make loans to him of considerable sums of money and also substantial gifts, some of them after Mack had become a member of the Federal Communications Commission and while the decision in the Channel 10, Miami, case was pending" (29 F.C.C. at 239). The use of Whiteside, a "very powerful" intermediary (29 F.C.C. at 225), was characterized by the examiner as "grossly improper" (29 F.C.C. at 227). He stated (29 F.C.C. at 227):

> The record had been officially closed and the case was under consideration by the Commission. If the representations were not of facts or matters properly for consideration by the Commission, they should not have been presented to Mack. If, on the other hand, they would have been proper evidence in the case, they should have been presented publicly to the entire Commission and not privately to one of its members and without the presence or knowledge of the other parties in interest. Certainly in adversary proceedings, as distinguished from the exercise of merely administrative functions, Commissioners of such a Federal agency as this are to all intents and purposes quasi-judges, and accordingly should be bound by the same legal, ethical, and professional rules as those by which judges are governed: [cases omitted] * * *.

The examiner concluded that the grant to Public Service was voidable and should be set aside because

of Mack's participation (29 F.C.C. at 239). He further concluded that the misconduct of the various applicants was not absolutely disqualifying but reflected upon them adversely from a comparative standpoint (29 F.C.C. at 239-240).

Following exceptions and oral argument, the Commission issued its Decision and Order of July 14, 1960, essentially adopting the examiner's findings,[4] but rejecting his conclusion that the misconduct of the three applicants should not be considered disqualifying (see Supp. J. App., 29 F.C.C. 216). The Commission stated (29 F.C.C. at 218):

> The Commission, after careful evaluation of the facts, is of the opinion that the misconduct of WKAT, Inc., North Dade Video, Inc., and Public Service Television, Inc., reflects so adversely upon their character as to demonstrate that they lack the qualifications to operate the station sought in this application. None of them was satisfied to be judged upon the record made in open hearing through the processes of adjudication specified by statute and grounded upon the principles of judicial fairplay; each of them sought to influence the results by factors unrelated to the merits of the case and not a part of the hearing record. Willingness to pervert the process of administrative adjudication is convincing proof that the requisite character qualifications are lacking. Their misconduct is " * * * of such moment as * * * logically and rationally

---

[4] Among the changes made in the examiner's findings, the Commission made certain new findings on North Dade (29 F.C.C. at 217).

> to give rise to the conclusion that the public interest, convenience, and necessity would not be served were * * * " the applications in question, or any of them, granted. [Footnote citations omitted.]

The Commission also determined that the record on remand disclosed nothing adverse to the qualifications of the sole remaining applicant, Wilson, which had previously been found to be qualified, and that it would serve the public interest to grant Wilson's application. However, because of the default nature of the award, Wilson's initial license period upon completion of construction was limited to four months instead of the customary three years (29 F.C.C. at 218). The Commission's order set aside the original grant to Public Service, denied the applications of Public Service, WKAT, and North Dade, and granted the application of Wilson (29 F.C.C. at 218).

The Commission transmitted its decision on remand to the court of appeals, together with the record developed in the remand proceedings. After the filing of briefs and oral argument, the court, treating the Commission's opinion as a recommendation for approval by the court,[2] approved the Commission's find-

---

[2] The court considered its previous remand order as directing the Commission, after further hearing, to formulate the orders it deemed appropriate, and to recommend their adoption to the court, in accordance with the procedure expressly established by 5 U.S.C. 1037(c) for handling remands to the Commission in review proceedings coming within the Judicial Review Act of 1950, 5 U.S.C. 1031, *et seq.* Accordingly, it remanded the case to the Commission "for entry of the order it now proposes" (Pet. 8a). The court expressly stated how-

ings and conclusions and remanded the cases to the Commission for entry of the orders proposed in the Commission's decision of July 14, 1960 (Pet. App. 1a-8a.) Stating that the doctrine of *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, and *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 541 (C. A. 3), certiorari denied, 335 U.S. 912, "applies to the adjudicatory functions of an administrative agency" (Pet. App. 6a), the court held that the Commission had properly disqualified Public Service for "corrupt tampering with the adjudicatory process itself", (Pet. App. 6a, 8a). The court stated (Pet. App. 6a):

> This doctrine [that one who seeks to control a judge or jury by personal influence is fortunate if he loses no more than the rights he seeks to obtain] applies to the adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

---

ever that "[i]f we were to treat the order of the Commission now before us (dated July 14, 1960) as a final order before us on appeal of North Dade Video [which had appealed in case no. 16089 from the July 14, 1960 order of the Commission] we would affirm it" (*ibid.*).

ARGUMENT

In sustaining the authority of the Commission to set aside the grant and to disqualify petitioner because of its use of improper influence, the court of appeals correctly applied well-settled law. It has been established for many years that *ex parte* presentations by a party vitiate an administrative proceeding which is required by statute, as this one was, to be made upon the record of an evidentiary hearing. *Morgan* v. *United States*, 298 U.S. 468, 480; *Morgan* v. *United States*, 304 U.S. 1, 19-20; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304. It is equally clear that an attempt to secure an award in such a proceeding through *ex parte* influence, rather than by a presentation of the merits of the case in the public processes of adjudication, is sufficient ground for denying the award. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238; *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (C. A. 3), certiorari denied, 335 U.S. 912. The application of this principle to the grant of a television license in the public interest—where character is an essential element, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228-229—raises no substantial question warranting review by this Court. See *WORZ, Inc.* v. *Federal Communications Commission*, 358 U.S. 55.

1. Petitioner (Pet. 10-11) charges that the Commission's order is vitiated by its failure to find a violation of section 409(c)(2) of the Communications Act, 47 U.S.C. 409(c)(2). This section pro-

hibits any "person who has participated in the presentation or preparation for presentation" of a case before the Commission from "directly or indirectly mak[ing] any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate." But in view of the fact that the examiner, the Commission, and the court below all found that petitioner's misconduct constituted improper "influence" which struck "at the very heart of the integrity of the judicial process" (29 F.C.C. at 227; 29 F.C.C. at 218, Pet. App. 6a),[6] the Commission could properly determine that the case should be decided on this broader basis and that the question of non-compliance with section 409(c)(2) need not be specifically decided.[7]

---

[6] Petitioner's statement (Pet. 10, n. 3) that its activities involve at most the *ex parte* presentation of material which could have been presented on the merits, rather than an attempt at influence, is squarely contradicted by the record and the findings. As the examiner found (29 F.C.C. at 231-232), the reason why Public Service procured Whiteside as its off-the-record emissary to former Commissioner Mack was because of the knowledge of the personal friendship between the two men.

[7] That this was the Commission's determination is clear. North Dade's proposed conclusion No. 5 before the examiner was that George T. Baker and Paul R. Scott, officials of petitioner, had directly or indirectly procured or ratified the misconduct, and had thus violated section 409(c)(2) (R. 9015-9016). The examiner, without further explanation, affirmed this conclusion, except as to the alleged violation of section 409(c)(2) (J. App. 110). North Dade took exception to this ruling on the alleged violation of section 409(c)(2). (Exception No. 5, R. 9111). The Commission denied the exception on the ground that it was "Moot in view of the Commission's decision herein" (29 F.C.C. at 220).

Petitioner erroneously assumes (Pet. 10-11) that the specific prohibition of section 409(c)(2) sets a limit upon the Commission's power to deal with misconduct affecting the administrative process. An attempt to "influence" an agency "by factors unrelated to the merits of the case" (29 F.C.C. at 218) is not immunized because no statute prohibits it in terms, or because an existing statute, not relied upon by the Commission, could also have been made the basis of decision.[8] The Commission and the court of appeals properly held that decision here could rest on the violation of a universally recognized standard of right conduct, rather than merely on a finding that a presentation concerning the case had been made without notice and an opportunity for all parties to participate.[9] The gross misconduct of which peti-

---

[8] The findings of the examiner which were adopted by the Commission, and the Commission's stated reasons for disqualifying petitioner, were broad enough to include noncompliance with section 409(c)(2). The examiner found petitioner (acting in part through Baker and Scott, who were witnesses at the earlier public hearing) responsible for the *ex parte* presentations made on its behalf (29 F.C.C. at 238-239), and the Commission stated (29 F.C.C. at 218), "None of them [the disqualified applicants] was satisfied to be judged upon the record made in open hearing through the processes of adjudication specified by statute and grounded upon the principles of judicial fairplay; each of them sought to influence the results by factors unrelated to the merits of the case and not a part of the hearing record."

[9] A letter from a witness for an applicant to the Commission, urging the applicant's fitness, would violate section 409(c)(2) if sent during a hearing and without notice to other parties, but would not, in the absence of other circumstances,

tioner was correctly found guilty clearly warranted the conclusion that it was unfit, under the public interest standard, to receive the award it sought to obtain, whether or not a violation of some specific provision of law was also found. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223; *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 32-33 (C.A. D.C.); *Mester* v. *United States*, 70 F. Supp. 118, 121-122 (E.D.N.Y.), affirmed 332 U.S. 749. There is no conflict between the decision below and the Communications Act.[10]

---

constitute the same sort of misconduct revealed by this record. A violation of section 409(c)(2), not involving an attempt to "influence" the decision "by factors unrelated to the merits of the case", might well be held to require a new proceeding but not absolutely to disqualify the responsible party. See *WHDH, Inc.*, 29 F.C.C. 204, rehearing denied, 29 F.C.C. 986, affirmed, *sub nom., Massachusetts Bay Telecasters, Inc.* v. *Federal Communications Commission* case No. 13,896, order of January 19, 1961 (C.A.D.C.), certiorari denied *sub nom. WHDH, Inc.* v. *Federal Communications Commission*, 366 U.S. 918.

[10] Petitioner's reliance (Pet. 10) upon Congressional consideration of proposals to broaden section 409(c)(2) is misplaced. Such proposals went to the difficult and different problem of preventing off-the-record advice from persons having no connection with a proceeding before the Commission. Thus, then-Chairman Ford, in his testimony before the House Committee on Interstate and Foreign Commerce quoted by petitioner (Pet. 10, n. 4), made clear that, so far as adjudicatory proceedings are concerned, the "loophole" in section 409(c)(2) is that it does not reach persons not within the Commission's jurisdiction. Hearings on Independ-

2. Petitioner's other points do not present any substantial issue. It asserts (Pet. 11-12), without supporting details, that applicant Wilson was guilty of similar misconduct, but that the Commission failed to treat Wilson as it treated petitioner. The short answer is that the examiner, the Commission, and the court below all agreed, upon careful review of the record, that Wilson did not engage in any improper conduct and was qualified to receive a grant. The resolution of this factual issue raises no question for further review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503.

Petitioner's contention (Pet. 12-13) that the revocation procedures of section 312 of the Communications Act, 47 U.S.C. 312 (Pet. 4), should have been followed, rests on the unsupportable assumption that the initial award to petitioner had become final and non-reviewable, although it was pending on appeal.

---

ent Regulatory Agencies Legislation, 86th Cong., 2d Sess., pp. 73-86. Misconduct of a party to an adjudicatory hearing was not the subject of the discussion.

The suggestion (Pet. 14) that at the time there was a prevailing view that *ex parte* approaches were proper is not correct. *Ex parte* approaches by parties in adjudicatory proceedings (to say nothing of attempts to exert influence by factors unrelated to the merits of the case) have never been condoned. It is true that, prior to the decision in *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.), there was a widespread belief that *ex parte* presentations (but not efforts to exert improper influence) were permissible in *rule making proceedings*. See *Sangamon Valley Television Corp.*, 19 Pike & Fischer, Radio Regulation 1055, at 1056d. But this has no effect on petitioner's case which was an adjudicatory proceeding.

The 1958 remand order of the court below (*supra*, pp. 4-5) was consonant with the "familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied" or "to the end that valid and essential findings may be made," *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373, 374. Accordingly, petitioner's grant never became final but instead was properly withdrawn in the course of the appellate proceedings.

Finally, petitioner's point (Pet. 13-14) that the Commission could not disqualify it on the basis of its misconduct without weighing its other qualifications to be a licensee is directly contrary to well-settled law. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228-229; *Federal Communications Commission* v. *Broadcasting Service Organization*, 337 U.S. 901, reversing *per curiam* 171 F. 2d 1007 (C.A.D.C.); *Mester* v. *United States*, 70 F. Supp. 118 (E.D.N.Y.), affirmed, 332 U.S. 749. The court of appeals correctly held (Pet App. 6a) that the Commission had discretion to conclude that "[n]o * * * capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government * * *."

CONCLUSION

The decision below is in accord with established principles and presents no substantial question warranting further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Assistant General Counsel.

RUTH V. REEL,
Counsel,

Federal Communications Commission.

SEPTEMBER, 1961

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 606346 252

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 1 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT L. B. WILSON, INC. IN OPPOSITION

ROBERT A. MARMET
EDWIN R. SCHNEIDER
Attorneys for
L. B. WILSON, INC.
1820 Jefferson Place, N. W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Reports below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement of the case	2
Argument	4
Conclusion	9

CITATIONS

CASES:

Federal Communications Commission v. WOKO, 329 U.S. 223	5
Morgan v. United States, 304 U.S. 1	5, 8
National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498	6
Simmons v. Federal Communications Commission, 145 F. 2d 578 (C.A.D.C.)	5

STATUTES:

Communications Act, as amended (47 Stat. 1064, 47 U.S.C. Section 15 *et seq.*)	
Section 312	6
Section 409(*c*)(2)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENT L. B. WILSON, INC. IN OPPOSITION

REPORTS BELOW AND JURISDICTION

The statements concerning reports of this case in the courts below and jurisdiction, as set forth in the petition for a writ of certiorari, are considered adequate.

QUESTIONS PRESENTED

Although the four questions presented in the petition have been cast in an argumentative fashion, they generally suggest the issues in this case and will be considered in the argument in this brief. It is respectfully submitted, however, that the record of this case really raises only one central issue, which can be phrased as follows:

Whether it is proper for the Federal Communications Commission to deny a privilege to an applicant who seeks to obtain an award of that privilege by corrupt tampering with the adjudicatory process.

STATUTES INVOLVED

All necessary sections of the pertinent statute have been set forth in the petition.

STATEMENT OF THE CASE

The statement of facts of this case submitted by petitioner is substantially accurate, with the exception of certain omissions and inaccuracies which will be considered in the following paragraphs.

In his Initial Decision of December 1, 1958, Judge Horace Stern, the specially appointed Hearing Examiner, made extensive findings about the conduct of the petitioner which are not mentioned in the petitioner's statement. Judge Stern's full finding of fact regarding the petitioner is quoted as follows:

> "2. National Air Lines, Inc., on behalf of the applicant, Public Service Television, Inc., of which it was the owner, through its emissary, Thurman A. Whiteside, attempted improperly, by private interviews and otherwise not by the recognized and public processes of adjudication, to influence Com-

> missioner Mack with respect to the proceedings which resulted in the award of the construction permit for Channel 10, Miami, in order to induce him to favor and to vote for Public Service Television, Inc., in the final decision." (S.J.A. 29 FCC 238)

To reach this finding of fact, Judge Stern considered the undisputed evidence that the principals of National Air Lines had approached Mr. Whiteside and offered him a fee, after the record of the case was closed, without even knowing whether he was a member of the Bar of the Federal Communications Commission. Whiteside was selected because it was thought that he "might have an entree to Mack that other people would not have"—because he "stood top notch with Mr. Mack." Judge Stern found that the attempt to employ Whiteside was inspired neither by his professional competence nor the need for professional services, but only by the expectation that his personal influence with Mack would be expected to win a favorable decision for the petitioner. Whiteside was directed to "use his own devices to secure this channel for National Air Lines." (S.J.A. 29 FCC 231, 232)

Judge Stern characterized National Air Lines' attempts at influence as "reprehensible activities and improprieties". He concluded that a person guilty of such misconduct "cannot be allowed to obtain any advantage or profit by his wrongdoing, nor suffered to enjoy the fruits of his transgression". (S.J.A. 29 FCC 237, 238)

Judge Stern refused to adopt proposed findings of fact which urged that L. B. Wilson, Inc., had improperly attempted to influence a Commissioner through Senator Smathers. In fact, he found that this senator

had aided another applicant (WKAT, Inc.) in improper attempts to influence a Commissioner (S.J.A. 29 FCC 225, 230, 231, 238).

The findings of the specially appointed hearing examiner were approved by the Commission. It found that all of the applicants except L. B. Wilson, Inc. had demonstrated that they were unfit to be licensees. Consequently, the construction permit was awarded to L. B. Wilson, Inc. (S.J.A. 29 FCC 218)

The Court of Appeals for the District of Columbia Circuit, after a complete review of the record, approved the Commission's action. It found that the petitioner's efforts at improper influence "eat at the very heart of our system of government—". Concluding that this case involved "corrupt tampering with the adjudicatory process itself," the Court approved the Commission's conclusion that "no public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government." (App. to Petition, p. 6a)

ARGUMENT

1. Petitioner has urged upon this Court the proposition that Section 409(c)(2) of the Communications Act is the sole standard of ethical conduct to be applied in determining the propriety of an applicant's conduct in an administrative proceeding. It is then claimed that the Commission expressly refused to find a violation of this section. The two parts of this argument are based upon petitioner's errors of law and fact. The Commission never made any express finding concerning violation of Section 409(c)(2). It merely denied an exception to a failure to find such violation on the

ground that it was: "Moot in view of the Commission's Decision herein." (S.J.A. 29 FCC 220) The Commission never reached the questions raised by this section because it was not necessary to do so. Upon a review of the petitioner's conduct, both Judge Stern and the Commission found it guilty of "reprehensible activities and improprieties." This misconduct reflected so adversely upon the petitioner's character that the Commission could only conclude that it lacked the qualifications to be a licensee. *Federal Communications Commission* v. *WOKO*, 329 U.S. 223. Since the Supreme Court's decision in *Morgan* v. *United States*, 304 U.S. 1, 22, there has been no question that the "cherished judical tradition embodying the basic concepts of fair play" governs the conduct of litigants appearing before administrative agencies. The petitioner has not even challenged the accuracy of Judge Prettyman's statement that, "This case concerns corrupt tampering with the adjudicatory process itself." Contrary to petitioner's contention, there is no confusion among litigants before administrative agencies regarding the propriety of such corrupt practices.

2. The petitioner has resurrected a consistently discredited contention that L. B. Wilson, Inc., attempted to exert improper influence upon Commissioner Mack through Senator Smathers.[1] This diversionary attack upon the qualifications of L. B. Wilson, Inc., has been launched before the specially appointed hearing examiner, the Commission and the Court of Appeals.

---

[1] It should be noted that petitioner has no standing to raise this question. Any injury to this petitioner results from its own misconduct and inevitable disqualification, not from the award to L. B. Wilson, Inc., *Simmons* v. *Federal Communications Commission*, 145 F. 2d 578 (C. A. D. C.).

The contention has been rejected at every stage of the proceedings. In fact, the Court of Appeals did not even seem to consider the point worthy of discussion, merely noting that "L. B. Wilson, Inc., was not involved in irregular activities" (App. to Petition, p. 6a). Thus, the petitioner is requesting this Court to accept a factual determination which has already been rejected at three separate stages of this case.[2] In cases of this nature this Court has properly confined its review to important issues of law. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-3.

3. The petitioner seeks, but is not entitled to, the rights provided in Section 312 of the Communications Act. Petitioner has never received a final grant of a construction permit. Its claim that it has built and operated a television station pursuant to a construction permit which never became final does not earn for it the rights provided by Section 312 of the Act. The station was constructed at the petitioner's peril while the Commission's discredited decision was on appeal.

---

[2] Senator Smathers was one of three co-executors of the Estate of L. B. Wilson, the former majority stockholder in L. B. Wilson, Inc., who died in 1954. None of the three executors had any voting rights in the stock of L. B. Wilson, Inc., held by the Estate of L. B. Wilson, all voting rights in Mr. Wilson's stock having passed to three senior employees of the Wilson company (J.A. 38-39). Thus, there was no relation between Senator Smathers and L. B. Wilson, Inc. Senator Smathers wanted L. B. Wilson, Inc. to dismiss the application so that the Estate could be closed. The record is clear that Senator Smathers thought the L. B. Wilson, Inc. application should be dismissed or denied. The petitioner's position becomes ludicrous when it is noted that petitioner's President stated under oath before Judge Stern that he had never heard Senator Smathers' name mentioned in connection with this case except when he was trying to help WKAT, Inc.

Petitioner's permit was not revoked because it was never final. It is to be set aside as a result of a hearing on remand from the Court of Appeals. Thus, there is no question involving Section 312 of the Communications Act in this proceeding. The minimal significance of this issue is demonstrated by the fact that the petitioner did not even mention Section 312 of the Act in its brief-in-chief before the Court of Appeals. It first raised the Section 312 argument in its reply brief.

4. As its fourth reason for granting a writ in this case, the petitioner advances two basic, though unrelated, arguments.

First, it claims that the facts developed in the remand proceeding could not support absolute and automatic disqualification. Petitioner urges that all other factors ordinarily considered in a comparative proceeding should be balanced against its gross misconduct, and that a determination should then be made regarding public interest. The weakness of this argument is apparent when the nature of the misconduct is considered. Judge Stern found the petitioner guilty of "reprehensible activities and improprieties". The Commission found the pteitioner unfit to be a licensee because of its "willingness thus to pervert the process of administrative adjudication . . ." (S.J.A. 29 FCC 218) Reviewing all of the facts and the record of this proceeding, the Court of Appeals concluded that the petitioner's activities ate at "— the very heart of our system of government, due process, fair play, open proceedings, unbiased, uninfluenced decision." The Court of Appeals then articulated the reason why the petitioner's argument is unacceptable:

> "We do not have here an ordinery case of 'unclean hands', in which counterbalancing considerations

> of public interest in the service involved might justify awards despite misbehavior. This case concerns corrupt tampering with the adjudicatory process itself. No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government, the Commission concluded." (The Court then approved the Commission's conclusion)

Petitioner has not seriously questioned the conclusions of three tribunals regarding its reprehensible conduct. Instead, it comes before this Court as a "corrupter of the government" and asks for a further lengthy hearing before the Commission to prove that such reprehensible conduct is merely one of several minor factors to be considered in a comparative proceeding. The outcome of such a proceeding is quite predictable. The effort to obtain such a hearing is clearly an attempt to keep this profitable operation on the air for a few more years, so that the petitioner may continue to reap the fruits of its misconduct.

The second part of the petitioner's fourth point contains the somewhat cynical argument that its misconduct was proper because there was an established climate of improper activity before the Commission at the time. Petitioner claims that it was merely playing the game in accordance with the corrupt customs in vogue at the time. Petitioner's description of 'the prevailing view at that time" is based on the thinnest speculation. Furthermore, the argument fades to insignificance in the light of this Court's established determination that adjudicatory functions of an administrative agency must be conducted in accordance with "cherished judicial tradition embodying the basic concepts of fair play." *Morgan* v. *United States*, 304 U.S.

1, 22. The standards of ethical conduct have been judicially established. In the face of such precedent, litigants can not be allowed to plead their cases in accordance with their own unique concept of fair play.

In concluding its argument at pages 14 and 15 of the brief, the petitioner brings out a point which is unrelated to any of the issues stated in the petition. It appears to be an emotional appeal containing broad allegations that the petitioner has constructed a television station at substantial expense, has employed a large staff and has been broadcasting since 1957. The appeal overlooks the fact that the station was constructed at the petitioner's peril while the validity of the award was subject to appellate review. It fails to mention that respondent L. B. Wilson, Inc. has constructed similar facilities at substantial expense pursuant to an award from the Commission. It fails to mention the huge profits which the petitioner has reaped as the fruits of its misconduct (petitioner's president has estimated them at $750,000.00 per year). It fails to mention the fact that petitioner's president has publicly stated that the company's assets could be liquidated "without incurring any material loss." (Registration Statement filed with Securities and Exchange Commission, September 21, 1960). This attempt at an emotional appeal is not only irrelevant, it is also misleading in its attempt to place the petitioner in an attractive equitable position. It should be disregarded.

CONCLUSION

The petitioner has raised no substantial question warranting review by this Court. Resolution of the basic issue in this case is clear. The Commission may properly deny an award to an applicant who attempts

to obtain it through corrupt influence. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. MARMET
EDWIN R. SCHNEIDER

Attorneys for respondent
L. B. WILSON, INC.

1820 Jefferson Place
Washington, D. C.

September 1, 1961

FILED
SEP 21 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, and L. B. WILSON, INC., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

MOTION FOR DAMAGES FOR DELAY

ROBERT A. MARMET
EDWIN R. SCHNEIDER, JR.
Attorneys for L. B. Wilson, Inc.

MARMET & SCHNEIDER
1820 Jefferson Place
Washington 6, D. C.

September 21, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, and L. B. WILSON, INC., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

MOTION FOR DAMAGES FOR DELAY

L. B. Wilson, Inc., (Wilson) respondent herein, by its attorneys, respectfully requests that this Court direct Public Service Television, Inc. (PST) petitioner herein, to pay to respondent Wilson the damages which it has suffered because of the delay occasioned by the filing of the petition for a writ of certiorari.

1. Rule 56.4 of this Court provides as follows:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for grant-

ing such a writ, the Court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

2. On July 6, 1961 a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit entered a judgment in this proceeding directing the Federal Communications Commission (Commission) to issue an order to the petitioner to terminate its operation on Channel 10 in Miami, Florida, and directing respondent Wilson to commence operation on this channel. The petitioner's motion to the Court of Appeals for a stay of this judgment was denied, *per curiam,* on September 1, 1961. On September 11, 1961 the Chief Justice of the United States ordered that the judgment of the Court of Appeals be stayed to and including October 16, 1961.

3. On July 14, 1960 the Commission entered an order setting aside its order of February 8, 1957, which had granted the PST application to operate on Channel 10 in Miami. This July 14 order, in addition to setting aside the PST grant, granted Wilson's application for Channel 10. Under the terms of the construction permit granted to Wilson, construction was required to commence with sixty days. Pursuant to the authority contained in this permit, Wilson constructed an entire new station in record time on Channel 10, so that the public would not lose service when PST went off the air. A real threat of loss to the public existed, as PST had been ordered to close down its operation by September 15, 1960.

4. The Commission denied petitioner's request for a stay. Petitioner then filed a similar request with the Court of Appeals. The Commission, in order to

preserve the jurisdiction of the Court of Appeals to act upon the application for stay, issued an order continuing the PST operation until fifteen days after the Court of Appeals ruled upon the application for stay.

5. Wilson constructed this station in good faith on the basis of the Commission's order of July 14, 1966, granting its application for a construction permit. As a result, Wilson has committed over one million dollars to this operation. Large amounts have been spent to maintain these facilities in a stand-by status ready to provide a full program service on fifteen days notice. As indicated in the attached affidavit, the monthly stand-by costs required to maintain this facility in a state of readiness amount to at least $15,000.00.

6. From the above it is quite apparent that L. B. Wilson, Inc., is being damaged severely by the delays occasioned by the filing of the petition for a writ of certiorari. The only question remaining under Rule 56.4 is whether there appears to be any ground for granting the writ.

7. The petition for a writ of certiorari and the briefs of the respondent are before this Court. They will be studied by this Court in passing upon the petition for a writ. It would be unduly repetitious to repeat the arguments contained in these pleadings. In summary, however, the petition raises no matters meriting review in accordance with the considerations and criteria set forth in Rule 19 of this Court. From a review of the petition and the responsive briefs, it is apparent that the petitioner has not even seriously questioned the conclusions which have been reached at three stages of this proceeding regarding its reprehensible conduct and corrupt tampering with the adjudicatory process.

The obvious purpose of filing the petition with this Court was to obtain a little more delay so that the petitioner could maintain its profitable operation until the last possible day. In the meanwhile, respondent L. B. Wilson, Inc. has been severely damaged at the rate of over $15,000.00 per month.

8. In the Court of Appeals decision in this case (App. to Petition, p. 5a, 6a) Judge Prettyman very aptly quoted with approval the doctrine set forth in [illegible] F. 2d 514, 541 (3rd cir. 1948) *cert denied* 335 U.S. 912 (1949). From the moment that a litigant ". . . ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the rights he seeks to obtain". To date, the petitioner has profited handsomely from its misconduct (petitioner's President has estimated profits at $750,000.00 per year). Almost a year ago, (in a Registration Statement filed with the Securities and Exchange Commission on September 21, 1960) the petitioner's President publicly stated that the company's assets could be liquidated "without incurring any material loss," regardless of the outcome of this litigation. It thus appears that PST is in an excellent financial position to compensate Wilson for its damages for the delay occasioned by the filing of the petition in this case.

9. The petitioner has already reaped large profits as the fruit of its misconduct. The petition for a writ of certiorari alleges no substantial ground for granting such a writ. Respondent Wilson has suffered and continues to suffer damage by delays in the disposition of this case. The conclusion is inescapable that the profits

gathered by the petitioner as a result of its corrupt practices constitute an appropriate fund to compensate respondent Wilson for its damages.

Wherefore, it is respectfully requested that this Court enter an order appointing a special master to ascertain the damages suffered by respondent Wilson for the delay occasioned by the filing of the petition for a writ of certiorari, and directing the petitioner to compensate Wilson for these damages.

Respectfully submitted,

ROBERT A. MARMET
EDWIN R. SCHNEIDER, JR.
Attorneys for L. B. Wilson, Inc.

MARMET & SCHNEIDER
1820 Jefferson Place
Washington 6, D. C.

September 21, 1961

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF DADE:

I, CHARLES H. TOPMILLER, being duly sworn, deposes and sayeth:

THAT I am President, Director, and a stockholder of L. B. Wilson, Inc., owners of WLBW-TV, Miami, Florida. As President of the Company, I can state that WLBW-TV was constructed, in the record time of approximately forty (40) days, and was ready to go on the air on November 4, 1960. The Station has been maintained in a position since that date to go on the air within fifteen (15) days.

Total expenditures to date have been over one million dollars. L. B. Wilson, Inc. has in excess of $746,000.00 invested in physical assets. The total standby expenses in keeping the Station in readiness to go on the air have amounted to in excess of $255,000.00. The standby expenses for the month of August, 1961, were in excess of $15,000.00. Expenses for subsequent months are expected to be at least as much.

In addition, L. B. Wilson, Inc. has committed itself to a two (2) year lease on its studio building in the amount of $45,600.00, with an additional payment of $2,100.00 for a purchase option on the studio building.

CHARLES H. TOPMILLER
Charles H. Topmiller
President

Sworn to and subscribed before me this 18th day of September, 1961.

LOIS S. COLE
(SEAL) *Notary Public*

FILED
SEP 28 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF IN OPPOSITION TO MOTION FOR DAMAGES FOR DELAY

NORMAN E. JORGENSEN
Attorney for Public Service Television, Inc.

2011 Eye Street, N.W.
Washington 6, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF IN OPPOSITION TO MOTION FOR DAMAGES FOR DELAY

Public Service Television, Inc., Petitioner herein, files this Opposition to L. B. Wilson's "Motion For Damages For Delay" and shows the following:

1. Contrary to Respondent's contention, the petition for certiorari filed by Petitioner is not responsible for

any delay in this case. The Rules of the Court below do not provide for automatic stays upon the filing of a petition for writ of certiorari. This is a matter committed to the discretion of the Court. Indeed in this case the Court below exercised this discretion and denied a stay. Similarly the Rules of this Court do not provide for automatic stays upon the filing of a petition for certiorari. The grant of a stay is likewise committed to the Court's discretion. Here the Court, upon consideration of Petitioner's application for stay and the opposition thereto, deemed appropriate a stay to and including October 16, 1961. The petition for certiorari and briefs in opposition thereto are now pending before the Court, and were pending when the application for stay was filed.

2. At no time has Petitioner sought to delay these proceedings. The Court of Appeals decision issued on July 6, 1961. Petitioner did not seek rehearing which would have operated as an automatic stay of the Court's decision in accordance with Rule 27(d) of the Court below. Petitioner did file on July 13, 1961 an application with the Court below to stay its judgment until August 5, 1961 to enable it to file a petition for writ of certiorari. In fact this petition for certiorari was filed on August 4, 1961. The Court below denied Petitioner's application for a stay on September 1, 1961. A copy of the Court's denial was received by counsel for Petitioner on September 5, 1961 and on that same day Petitioner applied to this Court for a stay. It is obvious then that at no stage of this litigation has Petitioner sought to delay the proceeding.

3. The petition for certiorari raises novel questions of substantial importance in the administration of the Communications Act and administrative agencies gen-

erally. Moreover as set forth on pages 14-15 of the petition for certiorari, Petitioner has a substantial and valuable interest in an operating broadcasting facility in Miami, Florida, which is seriously jeopardized by the decision of the Court below. Indeed, where as here the Court below refused a stay, "this Court requires an extraordinary showing before it will grant a stay of the decree below pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and a decided balance of convenience before it will grant such a stay." *Magnum Co.* v. *Coty*, 262 U.S. 159, 164. The suggestion in Respondent's motion that "there appears to be no ground for granting such a writ" is thus obviously baseless. And it begs the very question at issue before the Court at this moment.

4. Respondent's plea that it has expended money in constructing and maintaining television facilities can carry no weight. These expenditures were assumed with the knowledge that substantial litigation concerning the ultimate award was in progress.

Respectfully submitted,

NORMAN E. JORGENSEN
Attorney for Public Service Television, Inc.

2011 Eye Street, N.W.
Washington 6, D. C.

September 26, 1961.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, and L. B. WILSON, INC., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO MOTION FOR DAMAGES FOR DELAY

ROBERT A. MARMET
EDWIN R. SCHNEIDER, JR.
Attorneys for L. B. Wilson, Inc.
1820 Jefferson Place
Washington 6, D. C.

September 29, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, and L. B. WILSON, INC., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO MOTION FOR DAMAGES FOR DELAY

L. B. Wilson, Inc. respondent in this case, files this reply to the petitioner's opposition to its mts motion for damages for delay.

1. It is helpful to review the provisions of Rule 56.4 to clarify the issues raised by the me motion for

damages. The rule simply states that (1) "Where a petition for writ of certiorari has been filed" and (2) "there appears to be no ground for granting such a writ", then this Court (3) "may in appropriate cases, adjudge to the respondent reasonable damages for his delay."

2. A petition for writ of certiorari has been filed in this case. Petitioner does not dispute the fact that the respondent has been severely damaged. Thus, the only questions remaining are whether there is any ground for granting the writ and whether this is an appropriate case to adjudge damages to the respondent. As noted in paragraphs 6 and 7 of the motion for damages, the respondent recognizes that this Court will determine whether there is any ground for granting the writ when it passes upon the petition for the writ. With reference to the question of whether this is an "appropriate" case to assess damages, the motion contains substantial, uncontradicted factual allegations regarding the severe damage to L. B. Wilson, Inc. and the handsome profits which the petitioner has reaped as the fruit of its misconduct.

3. Petitioner cannot escape responsibility for the damages it has inflicted upon L. B. Wilson, Inc. by claiming that the filing of the petition did not cause delay. Since the decision was rendered by the Court below on July 6, 1961, every delay in implementing that decision has been based upon the petitioner's assertions that a petition would be or had been filed with this Court. The filing of the petition having been the basis of every action petitioner has taken to stay the July 6 decision, it is difficult to understand petitioner's assertion that the filing is unrelated to the delay.

4. Respondent L. B. Wilson, Inc. has recognized that the question of whether there is any ground for granting the writ is before the Court at this time. As is shown in the brief in opposition to the petition for a writ, it is unquestionably proper for the Federal Communications Commission to deny an award to an applicant who sought to obtain that award by corrupt tampering with the adjudicatory process. Considering the petitioner's proven misconduct, it would appear that this is a most "appropriate" case for the award of damages.

Respectfully submitted,

ROBERT A. MARMET
EDWIN R. SCHNEIDER, JR.
Attorneys for L. B. Wilson, Inc.
1820 Jefferson Place
Washington 6, D. C.

September 29, 1961